IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHELTON ALFORD,	:	
Petitioner,	:	
	:	CIVIL ACTION
v.	:	
	:	No. 00-683
SUPERINTENDENT JOHNSON, et al.,	:	
Respondents.	:	

MEMORANDUM AND ORDER

Brody, J. **March 1st , 2006**

Petitioner Shelton Alford ("Alford") petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. I referred the petition to the magistrate for a Report and Recommendation ("R&R") in accordance with 28 U.S.C. § 636(b)(1)(B). The magistrate's R&R recommends that I deny the petition. Petitioner and respondents have filed timely objections. I agree with the magistrate's recommendation to deny the petition. I write separately, however, in the hope of clarifying an issue often relevant to habeas petitioners and their counsel before this court. This relates to habeas review of the denial by a Pennsylvania court of collateral relief based upon the state bar on "previously litigated" claims.

Of particular concern was a line of Pennsylvania cases holding that ineffective assistance claims were merely "alternative theories" in support of the underlying substantive issue. See, e.g., Commonwealth v. Peterkin, 649 A.2d 121 (Pa. 1994); Commonwealth v. Christy, 656 A.2d 877 (Pa. 1995); Commonwealth v. Travaglia, 661 A.2d 352 (Pa. 1995). As the Pennsylvania Supreme Court noted in 2005, this approach "was...employed in a way that claims of trial counsel ineffectiveness that were based on an issue that was raised on direct appeal were

precluded as 'previously litigated' [on collateral attack]; and the merit of the claim relating to counsel's conduct and the adequacy of his representation were never examined." Commonwealth v. Collins, 888 A.2d 564, 571 (Pa. 2005). In Collins, the Pennsylvania Supreme Court finally rejected this line of cases. The court recognized that ineffective assistance claims are analytically distinct from an underlying substantive claim that counsel allegedly ineffectively failed to prove. See id. at 572-73; Kimmelman v. Morrison, 477 U.S. 365, 375 (1986). Therefore, the court held that "a Sixth Amendment claim of ineffectiveness raises a distinct legal ground for purposes of state [collateral] review under [the bar on "previously litigated" claims]. Ultimately, the claim may fail on the arguable merit or prejudice prong for the reasons discussed on direct appeal, but a Sixth Amendment claim raises a distinct issue for purposes of [collateral relief] and must be treated as such." Collins, 888 A.2d at 573.

After Collins, at least one concern raised by the instant case will no longer be present. As Pennsylvania courts will no longer bar collateral review of ineffective assistance claims whose underlying substantive issues were raised and rejected on direct appeal, the related issue of "procedural default" will no longer arise for such claims on habeas review. My analysis will still be relevant to prior cases, however. Furthermore, the issue of whether the "previously litigated" bar should generally be treated as a "procedural default" on habeas review is still current.

I. BACKGROUND

On December 11, 1987, a shooting by two gunmen at the Abbotsford Projects in

Philadelphia, Pennsylvania resulted in the death of one man and injuries to two others.[1] Police learned from eyewitnesses that a gold Nissan had been seen pulling up to Abbotsford shortly before the shooting.

On December 18, 1987, the police stopped a gold Nissan in which Alford was riding; the car was owned and driven by Malcolm Medley, who ultimately became Alford's co-defendant. The police stated that they wanted to interview Alford and Medley about the Abbotsford shooting. Alford voluntarily agreed to go with the police to the station, where he was interviewed. During Alford's interview, he denied being present at Abbotsford during the shooting and answered some questions about Medley and Medley's activities on the night in question. (Investigation Interview Record, Dec. 18, 1987, Resp.'s Ex. D.) After the interview, Alford was released. Approximately two months later, on February 17, 1998, Alford, along with Medley, was arrested and charged with murder and other crimes.

On February 6, 1989, following a jury trial in the Philadelphia Court of Common Pleas, Alford was convicted of first-degree murder and several lesser offenses. He was subsequently sentenced to life imprisonment.

On direct appeal to the Superior Court of Pennsylvania, Alford raised two claims of error. Only one is relevant here: Alford's claim that the trial court erroneously denied his pre-trial motion to suppress his statement taken during the interview on December 18, 1987. Alford argued that because he had not been Miranda-ized beforehand, his statement was the fruit of an unconstitutional custodial interrogation. The Superior Court rejected this claim as non-

[1] The facts relating to the murder and Alford's subsequent stop and interview are taken from Commonwealth v. Alford, No. 1726 PHL 1989, slip op. (Pa. Super. Ct. Aug. 14, 1990).

cognizable, because Alford's statement was never introduced at trial and Alford made no showing that the unintroduced statement prejudiced his trial in any way. Commonwealth v. Alford, No. 1726 PHL 1989, slip op. at 3-4 (Pa. Super. Ct. Aug. 14, 1990). The Superior Court went on to state that even if it were to address Alford's claim under Miranda, Alford would not prevail. Alford did not file a petition for allowance of appeal to the Pennsylvania Supreme Court.

On January 7, 1997, Alford, represented by new counsel, filed a petition for collateral relief under the Pennsylvania Post Conviction Relief Act ("PCRA"). Alford claimed that his trial counsel had provided ineffective assistance, based on five specific deficiencies:[2]

- **Claim #1:** Trial counsel failed to raise pre-trial the claim that Alford was arrested without probable cause on December 18, 1987;
- **Claim #2:** Trial counsel failed to raise pre-trial that Alford's right to counsel was violated during his custodial interrogation on this date;
- **Claim #3:** Trial counsel failed to raise pre-trial that the fruits of his arrest and interrogation should not have been admissible at trial;
- **Claim #4:** Trial counsel failed to raise pre-trial that the fruits of the police's failure to give Alford Miranda warnings should not have been admissible at trial; and
- **Claim #5:** Trial counsel failed to file a petition for allowance of appeal to the Supreme Court.

The PCRA Court denied claims one through four (trial counsel's failure to make pre-trial

[2] Although Alford's PCRA petition listed these five claims in a slightly different order, for the sake of consistency, I list them here in the order in which he lists them in his federal habeas petition.

claims) on the grounds that these claims had been "previously litigated."[3] Commonwealth v. Alford, No. 1685-1693, slip op. at 3-4 (Phila. County Ct. Com. Pl. Aug. 22, 1997). The PCRA Court denied claim five (trial counsel's failure to appeal to the Pennsylvania Supreme Court) on its merits.

The Superior Court affirmed the PCRA Court's denial of the petition but followed a different approach. The court denied Alford's claims of ineffective assistance for failure to make pre-trial claims relating to his interrogation (claim two, a portion of claim three, and claim four), on the ground that these claims had been "previously litigated" and rejected on direct appeal. The Superior Court denied on the merits Alford's claims of ineffective assistance for failure to make pre-trial claims relating to his arrest (claim one and a portion of claim three). Finally, the court denied on the merits Alford's fifth claim (trial counsel's failure to appeal to the Pennsylvania Supreme Court).

Alford filed a petition for appeal to the Pennsylvania Supreme Court, which was denied without opinion.

On February 7, 2000, Alford filed a federal habeas petition, alleging the same five ineffective assistance claims that he raised in his PCRA petition. On February 28, 2000, I referred the petition for consideration to the magistrate. On August 29, 2000, the magistrate issued a Report and Recommendations (R&R) recommending denial of Alford's petition. On December 27, 2002, after several intervening motions, petitioner filed *pro se* a Memorandum of

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[3] Although Alford had not raised any claims of ineffective assistance on direct appeal (at that stage, he was still being represented by the same counsel as at trial), apparently the PCRA court considered Alford's "ineffective assistance" claims to be mere variants of the Miranda suppression claim he had raised on appeal.

Law in response to the R&R. On January 3, 2003, I placed the case in suspense. On August 13, 2004, I granted leave to Alford's appointed counsel to withdraw. On March 11, 2005, I appointed new counsel to represent Alford. On April 14, 2005, I removed the case from civil suspense. On July 11, 2005, Alford filed counseled objections to the R&R. On August 15, 2005, respondents filed their response to Alford's objections, including their own objections.

II. DISCUSSION[4]

I will begin by discussing the interaction of the Pennsylvania Post Conviction Relief Act ("PCRA") bar on "previously litigated" claims and the federal "procedural default" doctrine, as this issue is relevant to many of Alford's claims and is a source of considerable confusion. I will then proceed to discuss Alford's claims in three groups. First, I will discuss his ineffective assistance claims relating to claims about his interrogation. Then I will discuss his ineffective assistance claims relating to claims about his arrest. Finally, I will discuss Alford's ineffective assistance claim relating to counsel's failure to seek appeal to the Supreme Court of Pennsylvania.

I apply the standard for review of state court decisions prescribed by the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, 28 U.S.C. § 2254.[5] Under the AEDPA, federal habeas relief may not be granted unless the underlying state court decision was either 1)

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[4] As required by 28 U.S.C. § 636(b) (2000), I have reviewed *de novo* those portions of the magistrate's Report to which specific objections have been made.

[5] In doing so, I sustain the respondents' objection to the R&R's two-step, *de novo*-then-AEDPA standard of review (R&R at 10-11), which was expressly rejected by the Supreme Court in Lockyer v. Andrade, 538 U.S. 63, 71 (2003), and is now inappropriate.

contrary to, or involved an unreasonable application of, clearly established Federal law or 2) was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. 28 U.S.C. § 2254(d)(1)-(2). Petitioner argues that the state court decisions at issue here were contrary to clearly established federal law. This is incorrect.

A. Interaction of PCRA's "previously litigated" bar and "procedural default" doctrine

As a threshold matter, after examining whether an issue has been exhausted in the state courts,[6] a court must determine whether any of the federal claims presented have been "procedurally defaulted." In cases like Alford's, this question may appear complicated due to the uncertain interaction of the federal "procedural default" doctrine and the PCRA's bar on "previously litigated" claims, 42 Pa. Cons. Stat. Ann. § 9543(a)(3). In the instant case, the R&R treated the "previously litigated" finding by the Superior Court on PCRA review as a "procedural default" barring federal habeas review. I do not adopt this approach.

Under the "adequate and independent state ground" doctrine, a federal court is generally barred from reaching a federal claim where the state court below refused to address the claim due to "an established state rule of law independent of the federal claim and adequate to support the refusal." Sistrunk v. Vaughn, 96 F.3d 666, 673 (3d Cir. 1996) In the federal habeas context, this arises in the form of the "procedural default" doctrine. Where a state court has refused to reach a habeas petitioner's federal claims due to the petitioner's failure to satisfy a state procedural rule,

[6] There is no issue regarding exhaustion in this case, as the ineffective assistance issues in this habeas petition were presented to all levels of the state court.

this is generally considered an "adequate and independent state ground"[7] and the petitioner is considered to have "procedurally defaulted" his federal claims. The consequence is that federal habeas review is foreclosed, unless the petitioner shows "cause" for the default and "prejudice" as a result of the alleged federal violation, or alternatively, the petitioner makes a sufficient showing of actual innocence. Id. (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991)). The doctrine ensures "that the States' interest in correcting their own mistakes is respected in all federal habeas cases." Coleman, 501 U.S. at 731-32. "Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." Id.

The PCRA's "previously litigated" rule is not a state "procedural requirement" within the meaning of Coleman. Under the "previously litigated" rule, a PCRA court must refuse to hear a claim where "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue; or...it has been raised and decided in a proceeding collaterally attacking the conviction or sentence." 42 Pa. Cons. Stat. Ann. §

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[7] State procedural rules will be "inadequate" and insufficient to bar federal habeas relief if "they are not 'firmly established and regularly followed,' or if they are 'novel [ ]' and unforeseeable." Bronshtein v. Horn, 404 F.3d 700, 707 (3d Cir. 2005) (citations omitted). Furthermore, "[t]he procedural default doctrine self-evidently is limited to cases in which a 'default' actually occurred – i.e., cases in which the prisoner actually violated the applicable state procedural rule." Randy Hertz & James Liebman, Federal Habeas Corpus Practice and Procedure § 26.2c, at 1154, 1154 n.15, 1156 n.16 (4th ed. 2001). See also Hill v. Mitchell, 400 F.3d 308, 314 (6th Cir. 2005) (reviewing de novo petitioner's constitutional claim despite state court's prior "misplaced" reliance on its own rule of procedural default); Greer v. Mitchell, 264 F.3d 663, 675 (6th Cir. 2001) ("[W]hen the record reveals that the state court's reliance upon its own rule of procedural default is misplaced, we are reluctant to conclude categorically that federal habeas review of the purportedly defaulted claim is precluded.").

9544(a)(2)-(3). The "previously litigated" rule thus limits the number of times a state court must consider a given claim, presumably for the sake of economy. A finding that a PCRA claim is "previously litigated" carries no implication of procedural error on the petitioner's part. It solely indicates that the petitioner had previously raised the claim (and lost). Therefore, unlike genuine procedural requirements, such as statutes of limitations or rules governing waiver, the "previously litigated" rule is not one that a petitioner can somehow "obey" in order to obtain PCRA review of his claim.[8] Cf. Sistrunk, 96 F.3d at 673-75 (because petitioner had failed to satisfy the PCRA's procedural requirement of first raising his Batson claim on direct appeal, thus barring substantive PCRA review, he thereby "procedurally defaulted" the claim for the purposes of federal habeas review).[9] Because the "previously litigated" rule is not a procedural requirement, it does not trigger the procedural default doctrine on habeas review.

In practical terms, a "previously litigated" finding by a PCRA court is an affirmance of the underlying state court ruling, and should be treated as such on federal habeas review. To do so would accord fully with the policy and purpose of the procedural default doctrine. As the Third Circuit in Sistrunk noted, the procedural default doctrine, like the exhaustion of state remedies doctrine, is

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[8] Indeed, the only way in which a petitioner can conform his PCRA petition to the "previously litigated" rule is by refraining from raising previously litigated claims altogether.

[9] Sistrunk may appear at first glance to apply to Alford's case, as it appears to involve the same "previously litigated" provision of the PCRA. It does not, due to the amendments to the PCRA since Sistrunk was decided. Under the version of the statute in effect at the time of Sistrunk, a claim was considered "previously litigated" both if it had been fully litigated all the way to appeal and if it had been litigated in the trial court but *not* appealed. In 1995, the state legislature amended the statute to indicate that the latter situation, where defendant raised a claim in the trial court and failed to appeal the adverse ruling, would be considered "waiver," not "previously litigated." See 42 Pa. Cons Stat. Ann. § 9543(b) (1995).

> designed to assure that the highest court of a state will have the opportunity to address the federal claim in the first instance.... [I]n a situation where...[PCRA] collateral review is barred...because the claim has been fully litigated and rejected on direct review[,] the petitioner will have exhausted state remedies and the state appellate courts will have had the required opportunity to address the federal claim.

96 F.3d at 675 n. 11. In other words, where the "previously litigated" rule has barred PCRA review, there need not be any concern about intruding upon the state courts, because the state court was duly given – and decided to pass upon – its opportunity to hear the claim.

In Villot v. Varner, 373 F.3d 327 (3d Cir. 2004), the Third Circuit applied similar logic in deciding the effect on habeas review of another PCRA rule, the requirement that a petitioner show actual innocence in order to obtain collateral relief from a guilty plea. The Third Circuit rejected the state's argument that the "innocence requirement" was a procedural requirement whose "violation" led to procedural default on habeas review. The Third Circuit reasoned that "when a state tacks on substantive additions to federal claims, it is the state itself that has forfeited its opportunity to consider the federal claims of the class of petitioners who cannot satisfy the additional state-created substantive requirement. The considerations of comity and federalism underlying the procedural default rule have no application in such cases." 373 F.3d at 334.

Similarly, here we are faced with the Pennsylvania legislature's choice to limit PCRA review to claims that are novel but not waived. This choice, like the choice to limit review of guilty plea claims to those where a showing of innocence is made, may be properly considered the state's own forfeiture of its opportunity to hear the claims falling outside this requirement. Therefore, as in Villot, allowing federal habeas review of claims barred by the PCRA's "previously litigated" rule implicates no comity or federalism concerns.

Thus, where the Superior Court found Alford's claims to be "previously litigated" (as discussed more fully below), those claims are not procedurally defaulted for the purpose of federal habeas review, and I overrule respondents' objections and the magistrate's R&R to the extent either argues or states otherwise.

B. Ineffective assistance relating to claims about Alford's interrogation

The first group of claims I will consider are Alford's claims of ineffective assistance relating to trial counsel's failure to make pre-trial claims relating to his interrogation. Upon appellate review of Alford's PCRA petition, the Superior Court (the highest state court to review the PCRA petition) refused to hear these claims, on the grounds that such claims had been "previously litigated."[10] See Commonwealth v. Alford, No. 2929 PHL 1997, slip op. at 8-9 (Pa. Super. Ct. Aug. 26, 1998). For the reasons stated above, I will treat the Superior Court's holding as an affirmance of its prior decision on direct appeal, denying Alford's Miranda suppression claim.

I review the Superior Court's decision on direct appeal insofar as it is relevant to the ineffective assistance claims before me.[11] Specifically, the Superior Court's findings below are relevant to whether Alford's trial counsel was deficient in performance and/or whether counsel's alleged deficiencies prejudiced Alford.

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[10] In reality, Alford did not raise any ineffective assistance claims on direct appeal (unsurprisingly, given that he was still being represented by his trial counsel). In finding his ineffective assistance claims "previously litigated," the Superior Court was applying the pre-Collins approach discussed in my introduction, which treated PCRA ineffective assistance claims as mere variants of the substantive claim raised on direct appeal. As this approach has been expressly overruled by Collins, it need not be discussed further.

[11] Alford raises no challenge to the Superior Court's denial of his Miranda suppression claim on direct appeal, so that holding is not before me.

I turn now to Alford's claims. For an ineffective assistance of counsel claim, the petitioner must show: 1) that his counsel's representation was deficient such that it "fell below an objective standard of reasonableness" ("the performance prong") and 2) that the deficient performance prejudiced his trial to the extent that it undermined confidence in the trial's outcome ("the prejudice prong"). Strickland v. Washington, 466 U.S. 668, 687-90 (1984).

First, I address Alford's claims that his trial counsel was ineffective for failing to raise the pre-trial claims that Alford's interrogation violated Miranda (claim four) and that the fruits of his interrogation should have been suppressed (a portion of claim three). These claims do not satisfy Strickland's performance prong. According to the Superior Court in the direct appeal, Alford's trial counsel *did* file a pre-trial motion to suppress Alford's statement (the only "fruit" of his interrogation) arguing that Alford's interrogation had violated Miranda. See Commonwealth v. Alford, No. 1726 PHL 1989, slip op. at 1, 4-5 (Pa. Super. Ct. Aug. 14, 1990). Alford has not presented any evidence to contradict the record. Therefore, Alford's ineffective assistance claim fails because his trial counsel did in fact undertake the allegedly omitted action, and therefore was not deficient in his performance.

Second, I consider Alford's claim that his trial counsel was ineffective for failing to raise the pre-trial claim that his interrogation had violated his Sixth Amendment right to counsel.[12] This claim fails on Strickland's prejudice prong. Assuming that Alford's trial counsel was deficient in failing to raise this argument for suppression of Alford's statement, the record indicates that Alford's statement was never introduced at trial. See Alford, No. 1726 PHL 1989, slip op. at 4-5 (Pa. Super. Ct. Aug. 14, 1990). It is unclear from the record what effect the

[12] Alford alleges that he asked for counsel during his interview at the police station.

unintroduced statement could have had on his trial, and Alford has offered no evidence or argument to suggest that there was any effect at all, much less that it was prejudicial. Therefore, Alford has failed to satisfy his burden to show prejudice under Strickland.

For the above reasons, Alford's ineffective assistance claims relating to claims about his interrogation are denied.

C. Ineffective assistance relating to claims about Alford's "arrest"

The second group of claims I will address are those relating to Alford's trial counsel's failure to argue pre-trial that his arrest was illegal (claim one) and that the fruits of this arrest[13] should have been suppressed (claim three). Upon appellate review of Alford's PCRA petition, the Superior Court rejected these claims on their merits.[14] As a result, I apply AEDPA's standard of review to that decision.

The court reasoned that because the record clearly showed that Alford had not been

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[13] According to Alford, the fruits of his arrest include his co-defendant Malcolm Medley's statement (taken during an interview on the same day as Alford's) and physical evidence found during a subsequent search of Medley's car. (Pet.'s Objections to R&R at 7.) As respondents point out, even assuming *arguendo* that Alford had been arrested, the only suppressable "fruit" of such an arrest would likely be Alford's own statement (which was never used against him). Medley's statement would not be suppressable by Alford because Fourth Amendment rights may not be invoked on behalf of another. Rakas v. Illinois, 439 U.S. 128, 133-34 (1978). The evidence seized from Medley's car would likely not be suppressable because passengers *qua* passengers generally have no Fourth Amendment expectation of privacy in a car owned by another. Id. at 148-49. Because I uphold that the Superior Court's finding on the PCRA appeal that Alford was never arrested in the first place, however, I need not reach this point.

[14] Respondents object, arguing that I should construe the Superior Court of Pennsylvania's opinion as rejecting these claims on procedural grounds. This is incorrect. The Superior Court explicitly analyzed Alford's claims relating to his "arrest" under the first step of Pennsylvania's ineffective assistance test (whether the underlying substantive issue has merit), rather than applying a procedural bar to these claims. See Commonwealth v. Alford, No. 2929 PHL1997, slip op. at 4, 6-7 (Pa. Super. Aug. 26, 1998). I therefore overrule the respondents' objection.

"arrested" on the day of his interview, any "illegal arrest" claims would have been meritless, and therefore Alford's trial counsel could not be found ineffective for failing to make such claims. The applicable facts are thus:[15] on December 18, 1987, after the police stopped co-defendant Malcolm Medley's car, in which Alford was a passenger, near the Abbotsford project, Alford was told that the police wished to question him as a possible witness to the Abbotsford murder. Alford voluntarily agreed to go with police to the station to be interviewed. He was placed in handcuffs during the ride to the station, then uncuffed upon arrival. See Commonwealth v. Alford, 1988 Nos. 1685-1693, slip op. at 6 (Phila. County Ct. Comm. Pl. Sept. 19, 1989); Commonwealth v. Alford, No. 2929 PHL 1997, slip op. at 7 (Pa. Super. Ct. Aug. 26, 1998).

Given these facts, the Superior Court is entitled to deference for its reasonable finding on PCRA appeal that Alford had not been arrested and therefore, any pre-trial "illegal arrest" claims would have been meritless. Under the Fourth Amendment, a person is "arrested" or "seized" if the police's conduct "communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." Florida v. Bostick, 501 U.S. 429, 437 (1991). Given the facts surrounding the police's request for an informational interview and Alford's consent, it was reasonable for the Superior Court to conclude in the PCRA appeal that under Fourth Amendment law, Alford had not been "arrested." Compare Hayes v. Florida, 470 U.S. 811, 816 (1985) (petitioner's lack of consent rendered the investigative detention an unlawful "seizure," and thereby warranted suppression of fingerprints taken); Kaupp v. Texas, 538 U.S. 626, 628-30 (2003) (petitioner's "Okay" in response to officers entering his bedroom and stating

[15] As the magistrate noted, under AEDPA, 28 U.S.C. § 2254(e)(1), the state courts' factual findings are presumed to be correct, and it is petitioner's burden to rebut this presumption by clear and convincing evidence. Petitioner has offered no evidence in rebuttal.

"we need to go and talk" did not establish consent sufficient to overcome probable cause requirement for arrest, and subsequent confession was inadmissible). Therefore, given the likelihood that any arrest-related pre-trial claims would have failed under the applicable precedent, it was reasonable to conclude that Alford's trial counsel was not deficient for failing to raise any such claims.

As the Superior Court's decision was not "contrary to clearly established federal law," Alford's ineffective assistance claims relating to claims about his arrest are denied.

D. Ineffective assistance relating to failure to seek appeal to Supreme Court

Alford's final claim (claim five) relates to his trial counsel's failure to seek appeal to the Pennsylvania Supreme Court after the Superior Court's denial of his direct appeal. As the magistrate noted, appeal to the Pennsylvania Supreme Court is not a matter of right under Pennsylvania law. Pa. R. App. P. 1114. The magistrate reasoned that because an individual has no constitutional right to assistance of counsel in pursuing such an appeal under Ross v. Moffitt, 417 U.S. 600, 610, 612, 619 (1974), as a result there can be no claim of ineffective assistance in the manner that such an appeal is (or is not) pursued under Wainwright v. Torna, 455 U.S. 586, 587-88 (1982). Neither petitioner nor respondents raise any objection to this finding, and I agree with the magistrate. I therefore adopt this finding and deny Alford's fifth claim for habeas relief.

III. CONCLUSION

Alford is not entitled to habeas corpus relief from his conviction for first degree murder and lesser offenses.

ORDER

AND NOW, this 1st day of March, 2006, it is hereby **ORDERED** that:

1. Petitioner's objections are **OVERRULED**. Respondents' objections are **SUSTAINED** in part and **OVERRULED** in part, as stated in the accompanying memorandum.
2. Shelton Alford's petition for writ of habeas corpus is **DENIED** with prejudice.
3. There is not probable cause to issue a Certificate of Appealability.

s/Anita B. Brody

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ANITA B. BRODY, J.

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